

Flowers v 73rd Townhouse LLC

2011 NY Slip Op 33838(U)

June 24, 2011

Sup Ct, New York County

Docket Number: 651036/2010E

Judge: Paul G. Feinman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Flowers, J. Christopher

INDEX NO. 651036/2010E

- v -

73 rd Townhouse LLC

MOTION DATE _____

MOTION SEQ. NO. 801

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

All attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

SEE PARTIAL ORDER FOR THIS MOTION TO CONFORM WITH THE ANNEXED DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/24/2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

J. CHRISTOPHER FLOWERS,
Plaintiff,

Index Number 651036/2010E
Mot. Seq. No. 001

against

73rd TOWNHOUSE LLC, 73rd TOWNHOUSE MEMBER,
LLC, 73rd KR LLC, JAMES K. RINZLER, BRADLEY
T. RINZLER, THE ESTATE OF MILTON S. RINZLER
JAMES K. RINZLER, BENJAMIN S. RINZLER,
BRADLEY T. RINZLER, ROBERTA K. RINZLER,
AS EXECUTIVES OF THE ESTATE OF MILTON S.
RINZLER, MILTON S. RINZLER, THE RINZLER
FAMILY LIMITED PARTNERS, DOMINION
PROPERTY GROUP, DOMINION MANAGEMENT
COMPANY LLC, DOMINION FINANCIAL
CORPORATION, DANIEL KINGSFORD and
JUDITH KINGSFORD,

DECISION AND ORDER

Defendants.

-----X

For the Plaintiff:
Brem Moldovsky, LLC
By: Brem Moldovsky, Esq.
110 Wall St., 11th fl.
New York, NY 10005-3817
(212) 563-3370

For the Defendants:
Goldberg Weprin Finkel Goldstein LLP
By: Kevin J. Nash, Esq.
1501 Broadway
New York, NY 10036
(212) 221-5700

E-filed papers considered in review of this motion for a default judgment:

Papers	E-file Document Number
Notice of Motion, Aff. in Supp., Exhibits, Memo of Law	4 - 6
Memo of Law in Opp., Aff., Exhibits	13 - 14-1
Memo of Law in Reply	18

PAUL G. FEINMAN, J.:

Defendants move, pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7) to dismiss the
complaint. For the reasons that follow, the motion is granted.

BACKGROUND

This case involves the sale of a townhouse by defendant 73rd Townhouse LLC to plaintiff on or about November 29, 2006. Following the closing, the net proceeds were used to pay expenses, repay loans, and make distributions to members. A total of \$685,000.00 was distributed to the members of 73rd Townhouse LLC in two installments, all of the checks clearing in March 2007. The distribution chain was as follows: from 73rd Townhouse LLC to 73rd Townhouse Member LLC (the 100% owner of 73rd Townhouse LLC), from 73rd Townhouse Member LLC to 73rd KR LLC (30% of which is owned by the Kingsford defendants, 70% owned by the remaining defendants), then from 73rd KR LLC to all of the other defendants. These distributions were reflected in the 2007 tax returns of 73rd Townhouse Member, LLC and 73rd KR LLC.

Before the distributions took place, plaintiff filed a lawsuit, *J. Christopher Flowers et al. v 73rd Townhouse, LLC* (Index no. 603786/2004), seeking an abatement of the purchase price. The abatement, originally denied by another justice of this court, was subsequently granted on appeal by the Appellate Division, First Department (52 AD3d 104 [1st Dept 2008]). On March 24, 2009, the parties entered into a consent judgment in the sum of \$500,000.00 to settle this price adjustment claim. Prior to this settlement, plaintiff had been told that there had been no distributions made from 73rd Townhouse LLC, but this information was incorrect and, on March 4, 2009, defendants' counsel wrote to plaintiff's counsel to inform him that distributions had, in fact, taken place. (Motion, Ex. C). According to defendants, these distributions were made during the period of time when plaintiff's claims for an abatement were denied and prior to determination of the appeal. No stay pending the appeal was in effect.

Plaintiff instituted the instant action on July 20, 2010, alleging fraudulent conveyance by 73rd Townhouse LLC to the detriment of plaintiff, a judgment creditor of the company. (Motion,

Ex. A). Defendants claim that this action is subject to section 508 (c) of the Limited Liability Company Act, which sets a three-year statute of limitations for claims for wrongful distributions against limited liability companies. This statute, defendants asserts, overrides all other statutes of limitations.

In opposition, plaintiff argues that the instant motion must be denied because it was addressed to the original complaint, and plaintiff has now filed an amended complaint. In the alternative, plaintiff claims that the six-year statute of limitations, as well as the two-year discovery period, of CPLR 213 (8) applies to the case at bar, not the three-year statute of limitations under the Limited Liability Company Act. Plaintiff bases this contention on the fact that the initial distributions were made to entities that do not qualify as members of 73rd Townhouse LLC, not individual persons, and so the provisions of the Limited Liability Act do not apply.

In reply, defendants state that the serving of an amended complaint while a dismissal motion is pending does not automatically abate the motion to dismiss the original complaint, because the motion is one to dismiss the claim. If there is no claim, no amendments could state one.

As for the substantive issue regarding the statute of limitations, defendants re-assert their initial arguments, and provide an affidavit of a certified public accountant. The accountant avers that payments from 73rd Townhouse LLC to conduits and, in turn, to the ultimate individuals, do not lose their character as proper distributions because they were paid from the net proceeds of the sale directly to the ultimate equity holders. (Reply, Ex. A).

DISCUSSION

CPLR 3211 (a) provides that:

“[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

* * *

(5) the cause of action may not be maintained because of arbitration award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

* * *

(7) the pleading fails to state a cause of action”

As stated in *Ladenburg Thalmann & Co., Inc. v Tim’s Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

“the court’s task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*, at 88).”

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

Section 508 (c) of the Limited Liability Company Act states, in pertinent part, that:

“[A] member who receives a wrongful distribution from a limited liability company shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution.”

Section 102 (i) of the Limited Liability Company Act defines a “distribution” as:

“the transfer of property by a limited liability company to one or more of its members in his or her capacity as a member.”

Section 102 (q) of the Limited Liability Company Act defines a “member” as:

“[A] person who has been admitted as a member of a limited liability company in accordance with the terms and provisions of this chapter and the operating agreement and has a membership interest in a limited liability company with the rights, obligations, preferences and limitations specified under this chapter and the operating agreement.”

Section 102 (w) of the Limited Liability Company Act defines “person” to mean:

“[A]ny association, corporation, joint stock company, estate, general partnership (including any registered limited liability partnership or foreign limited liability partnership), limited association, limited liability company (including a professional service limited liability company), foreign limited liability company (including a foreign professional service limited liability company), joint venture, limited partnership, natural person, real estate investment trust, business trust or other trust, custodian, nominee or any other individual or entity in its own or any representative capacity.”

Although

“[c]laims based on constructive fraud, such as those recognized by Debtor and Creditor Law §§ 273 and 273-a, are governed by the six-year statute of limitations set forth in CPLR 213 (1), and such claims arise at the time of the fraud or conveyance [and, w]here actual fraud is alleged, such as that recognized under Debtor and Creditor Law § 276, the statute of limitations is six years from the fraudulent transfer or two years from the time the fraud was discovered [internal citations omitted]”

(*Metzger v Yuenger Woodworking Corp.*, 33 AD3d 678, 679 [2d Dept 2006]), in the instant case, the controlling statute is the Limited Liability Company Act, which mandates a three-year statute of limitations.

“The three-year time limitation imposed by section 508 (c) overrides the limitation period applicable to any claim brought under the DCL with regard to distributions made by a limited liability company to a member. ‘[I]t was the intent of the New York legislature that claims under the DCL and contractual claims for the recovery of distributions be preserved, but only as limited by § 508 (c) [internal citations omitted].’”

Mostel v Petrycki, 25 Misc 3d 929, 932 (Sup Ct, NY County 2009); *see also Peckar &*

Abramson, P.C. v Lyford Holdings, Ltd., 2009 WL 5225151, 2009 NY Slip Op 33023(U), 2009

NY Misc Lexis 6376 (Sup Ct, NY County 2009).

In the case at bar, the alleged improper distribution was made to 73rd Townhouse Member LLC, which, pursuant to the Limited Liability Company Act, is a valid member. Even if

one were to disregard that distribution, the distribution from 73rd Townhouse Member LLC to 73rd KR LLC also qualifies as a distribution to a "member." There is no statutory requirement that a member of a LLC be a natural person.


The instant action was commenced more than three years after the distribution that is the subject of the lawsuit and, consequently, the action is time-barred, pursuant to section 508 (c) of the Limited Liability Company Act. Inasmuch as the claim is time-barred, it is impossible for plaintiff to amend the complaint to state a viable cause of action and, therefore, in the interest of judicial economy, the court declines to deny defendants' motion out of hand simply because an amended complaint has been served. Rather, because plaintiff cannot state a claim that is not time-barred, the claim should be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion is granted and the complaint is dismissed with costs and disbursement to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: June 24, 2011



J.S.C.